

## APPENDIX E

## INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act ("RFA"),<sup>1</sup> the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities by the policies and rules proposed in this *Second Report and Order and Third Notice of Proposed Rule Making* ("Third Notice"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Third Notice* provided above.

The Commission will send a copy of the *Third Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.<sup>2</sup> In addition, the *Third Notice* and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

#### A. Need for, and Objectives of, the Proposed Rule Changes:

This *Third Notice* requests comments concerning the applicability of new equal employment opportunity ("EEO") rules and policies with respect to part-time employees of broadcast and multichannel video programming distributors ("MVPDs"). The EEO rules apply to full-time employees, defined as those whose regular work schedule is 30 hours or more a week. The current record is insufficient to allow the Commission to determine whether and how to apply the rules to part-time positions, defined as fewer than 30 hours per week. Accordingly, the *Third Notice* seeks comment on this issue. In particular, the *Third Notice* seeks comment on how many and what types of positions in the broadcast and MVPD industries fall into this category; the significance of these positions in terms of entry into broadcasting; how burdensome compliance with the recruitment, record-keeping, and reporting requirements for all or some part-time positions would be for broadcasters and MVPDs; and whether the requirements applicable to part-time positions should be the same as or different from those applicable to full-time positions. We also seek comment on whether we should set a minimum number of hours for a part-time position to be covered by the rules and, if so, what that minimum should be.

#### B. Legal Basis:

Authority for the actions proposed in this *Third Notice* may be found in Sections 1, 4(i), 4(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 634 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(k), 257, 301, 303(r), 307, 308(b), 309, 334, 403, and 554.

#### C. Recording, Recordkeeping, and Other Compliance Requirements:

As noted, the purpose of this rulemaking is to determine whether and how to apply the Commission's EEO rules to employment positions involving fewer than 30 hours per week. Hence, this *Third Notice* anticipates that any recording, recordkeeping and compliance requirements proposed for part-time employees will not exceed those already provided for full-time employees.<sup>4</sup>

<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

<sup>2</sup> See 5 U.S.C. § 603.

<sup>3</sup> See *id.*

<sup>4</sup> See discussion in *FRFA*, *supra*, at Appendix B, Section C.

## D. Description and Estimate of the Number of Small Entities to Which the Rules Would Apply:

### 1. Definition of a "Small Business"

The proposed rules would apply to broadcast stations and MVPDs. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.<sup>5</sup> Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions.<sup>6</sup> The RFA, 5 U.S.C. § 601(3), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the [SBA] and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."<sup>7</sup>

A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."<sup>8</sup> Nationwide, as of 1992, there were approximately 275,801 small organizations.<sup>9</sup> Finally, "small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."<sup>10</sup> As of 1992, there were approximately 85,006 such jurisdictions in the United States.<sup>11</sup> This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.<sup>12</sup> The United States Bureau of the Census (Census Bureau) estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (96 percent) are small entities.

### 2. Issues in Applying the Definition of a "Small Business"

As discussed below, we could not precisely apply the foregoing definition of "small business" in developing our estimates of the number of small entities to which the rules will apply. Our estimates reflect our best judgments based on the data available to us.

An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio or

<sup>5</sup> 5 U.S.C. § 603(b)(3).

<sup>6</sup> 5 U.S.C. § 601(6).

<sup>7</sup> 5 U.S.C. § 601(3).

<sup>8</sup> 5 U.S.C. § 601(4).

<sup>9</sup> 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

<sup>10</sup> 4 U.S.C. § 601(5).

<sup>11</sup> U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

<sup>12</sup> *Id.*

television station is dominant in its field of operation. Accordingly, the following estimates of small businesses to which the new rules will apply do not exclude any radio or television station from the definition of a small business on this basis and are therefore overinclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. As discussed further below, we could not fully apply this criterion, and our estimates of small businesses to which the rules may apply may be overinclusive to this extent. The SBA's general size standards are developed taking into account these two statutory criteria. This does not preclude us from taking these factors into account in making our estimates of the numbers of small entities.

With respect to applying the revenue cap, the SBA has defined "annual receipts" specifically in 13 C.F.R. § 121.104, and its calculations include an averaging process. We do not currently require submission of financial data from licensees that we could use in applying the SBA's definition of a small business. Thus, for purposes of estimating the number of small entities to which the rules apply, we are limited to considering the revenue data that are publicly available, and the revenue data on which we rely may not correspond completely with the SBA definition of annual receipts.

Under SBA criteria for determining annual receipts, if a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period for determining annual receipts, the annual receipts in determining size status include the receipts of both firms." The SBA defines affiliation in 13 C.F.R. § 121.103. In this context, the SBA's definition of affiliate is analogous to our attribution rules. Generally, under the SBA's definition, concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both." The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists." Instead of making an independent determination of whether television stations were affiliated based on SBA's definitions, we relied on the databases available to us to provide us with that information.

### 3. Estimates Based on Census Data

The proposed rules will apply to broadcast television and radio stations." The SBA defines a television broadcasting station that has no more than \$12.0 million in annual receipts as a small business." Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.<sup>18</sup> Included in this industry are

<sup>13</sup> 13 C.F.R. § 121.104(d)(1).

<sup>14</sup> 13 C.F.R. § 121.103(a)(1)

<sup>15</sup> 13 C.F.R. § 121.103(a)(2).

<sup>16</sup> While we believe that the SBA's definition of "small business" in this context greatly overstates the number of radio and television broadcast stations that are small businesses and is not suitable for purposes of determining the impact of the rules on small television and radio stations, for purposes of this IRFA, we include the SBA's definition in determining the number of small businesses to which the rules would apply.

<sup>17</sup> 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513120

<sup>18</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

commercial, religious, educational, and other television stations.<sup>19</sup> **Also** included are establishments primarily engaged in television broadcasting and which produce taped television program materials.” Separate establishments primarily engaged in producing taped television program materials are classified under other North American Industry Classification (NAICS) numbers.”

There were 1,695 full-service television stations operating in the as of December 2001.<sup>22</sup> According to Census Bureau data for 1997, there were 906 Television Broadcasting firms, total, that operated for the entire year.” Of this total, **734** firms had annual receipts of \$9,999,999.00 or less and an additional 71 had receipts of \$10 million to \$24,999,999.00.<sup>24</sup> Thus, under this standard, the majority of firms can be considered small.

The **SBA** defines a radio broadcasting station that has no more than \$6 million in annual receipts as a small business.” **A** radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.” Included in this industry are commercial, religious, educational, and other radio stations.” Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.<sup>28</sup> However, radio stations which are separate establishments and are primarily engaged in producing **radio** program material are classified under another NAICS number.” According to Census Bureau data for 1997, there were 4,476 Radio Stations (firms), total, that operated for the entire year.” Of this total 4,265 had annual receipts of \$4,999,999.00 or less.

<sup>19</sup> *Id.*: see Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual*, at NAICS code 513120.

<sup>20</sup> 1992 Census, Series UC92-S-1, at Appendix A-9

<sup>21</sup> *Id.*: formerly SIC code 7812 (Motion Picture and Video Tape Production) (NAICS code 512110); formerly SIC code 7922 (Theatrical Producers and Miscellaneous Theatrical Services) (producers of **live** radio and television programs) (NAICS codes 512110, 512191, 512290).

<sup>22</sup> FCC News Release, Broadcast Station Totals as of December 31, 2001 (released May 21, 2002)

<sup>23</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Receipts Size of Firms Subject to Federal Income Tax: 1997,” Table 4, NAICS code 513120 (issued Oct. 2000).

<sup>24</sup> *Id.* The census data do not provide a more precise estimate

<sup>25</sup> 13 C.F.R. § 121.201, NAICS codes 513111 and 513112.

<sup>26</sup> 1992 Census, Series UC92-S-1, at Appendix A-9.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Receipts Size of Firms Subject to Federal Income Tax: 1997,” Table 4, NAICS code 513220 (issued Oct. 2000).

and an additional 103 firms had receipts of \$5 million to \$9,999,999.00.<sup>31</sup> Thus, under this standard, the great majority of firms can be considered small.

The proposed rules would also apply to MVPDs. SBA has developed a definition of a small entity for cable and other program distribution, which includes all such companies generating \$12.5 million or less in annual receipts.<sup>32</sup> This definition includes direct broadcast satellite services (DBS), multipoint distribution systems (MDS), and local multipoint distribution service (LMDS). According to Census Bureau data for 1997, there were 1,311 firms within the industry category Cable and Other Program Distribution, total, that operated for the entire year.<sup>33</sup> Of this total, 1,180 firms had annual receipts of \$9,999,999.00 or less, and an additional 52 firms had receipts of \$10 million to \$24,999,999.00.<sup>34</sup> Thus, under this standard, the majority of firms can be considered small. Below we discuss these services to provide a more succinct estimate of small entities.

*Cable Systems:* The Commission has developed, with SBA's approval, its own definition of small cable system operators. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.<sup>35</sup> Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable companies at the end of 1995.<sup>36</sup> Since then, some of those companies may have grown to serve more than 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the rules proposed herein.

The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate less than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenue in the aggregate exceeds \$250,000,000."<sup>37</sup> The Commission has determined that there are 67,700,000 subscribers in the United States.<sup>38</sup> Therefore, we found that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.<sup>39</sup> Based on available data, we find that the number of

<sup>31</sup> *Id.* The census data do not provide a more precise estimate,

<sup>32</sup> 13 C.F.R. § 121.201 (NAICS codes 513210 and 513220)

<sup>33</sup> U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Receipts Size of Firms Subject to Federal Income Tax: 1997," Table 4, NAICS code 513220 (issued Oct. 2000).

<sup>34</sup> *Id.* The census data do not provide a more precise estimate.

<sup>35</sup> 47 C.F.R. § 67.901(3). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 6393 (1995).

<sup>36</sup> Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>37</sup> 47 U.S.C. § 543(m)(2).

<sup>38</sup> FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice DA 01-158 (January 24, 2001).

<sup>39</sup> 47 C.F.R. § 76.1403(b) (SIC 4833).

cable operators serving 677,000 subscribers or less totals approximately 1,450.<sup>40</sup> Since we do not request nor collect information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

*MDS:* MDS involves a variety of transmitters, which are used to relay programming to the home or office." The Commission has defined "small entity" for purposes of the 1996 auction of MDS as an entity that, together with its affiliates, has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.<sup>41</sup> This definition of a small entity in the context of MDS auctions has been approved by the SBA.<sup>42</sup> These stations were licensed prior to implementation of Section 309(j) of the Communications Act of 1934, as amended." Licenses for new MDS facilities are now awarded to auction winners in Basic Trading Areas (BTAs) and BTA-like areas." The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 BTAs. Of the 67 auction winners, 61 met the definition of a small business.

*LMDS:* The auction of the 1,030 LMDS licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined "small entity" for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>43</sup> An additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>44</sup> These regulations defining "small entity" in the context of LMDS auctions have been approved by the SBA.<sup>45</sup> There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses will include the 93 winning bidders in the first auction

<sup>40</sup> Paul Kagan Associates, Inc., Cable TV Investor, Feb. 39, 1996 (based on figures for Dec. 30, 1995)

<sup>41</sup> For purposes of this item, MDS includes the single channel Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS).

<sup>42</sup> 47 C.F.R. § 1.2110(a)(1)

<sup>43</sup> See *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589 (1995).

<sup>44</sup> 47 U.S.C. § 309(j). (Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 41 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for "other telecommunications" (annual receipts of \$11 million or less). See 13 C.F.R. § 121.201.

<sup>45</sup> *Id.* A BTA is the geographic area by which the MDS is licensed. See Rand McNally, 1992 *Commercial Atlas and Marketing Guide*, 123rd Edition, pp. 36-39.

<sup>46</sup> See *Local Multipoint Distribution Service, Second Report and Order*, 12 FCC Rcd 12545 (1997)

<sup>47</sup> *Id.*

<sup>48</sup> See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SRA (January 6, 1998).

and the 40 winning bidders in the reauction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

*DBS:* Because DBS provides subscription services, it falls within the SBA-recognized definition of "Cable and Other Program Distribution."<sup>49</sup> This definition provides that a small entity is one with \$12.5 million or less in annual receipts.<sup>50</sup> Currently, there are nine DBS authorizations, though there are only two DBS companies in operation at this time. We neither request nor collect annual revenue information for DBS services, and are unable to determine the number of DBS operators that would be considered a small business under the SBA definition.

An alternative way to classify small entities is by the number of employees. Based on available data, we estimate that in 1997 the total number of full-service broadcast stations with four or fewer employees was 5186, of which 340 were television stations.<sup>51</sup> Similarly, we estimate that in 1997, 1900 cable employment units employed fewer than six full-time employees. Also, in 1997, 296 "MVPD" employment units employed fewer than six full-time employees.<sup>52</sup> We also estimate that in 1997, the total number of full-service broadcast stations with five to ten employees was 2145, of which 200 were television stations. Similarly, we estimate that in 1997, 322 cable employment units employed six to ten full-time employees. Also, in 1997, approximately 65 MVPD employment units employed six to ten full-time employees.

#### **E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:**

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities."

This *Third Notice* seeks comments on the applicability of the EEO rules to part-time employees, and would not change the status of small broadcasters or MVPDs.

We note that the issue at hand affects the compliance burdens of entities that, by definition, are not within our EEO small business size standards. We have nonetheless created this present initial analysis to encourage comments by small entities and create a fuller record.

Currently, broadcasters with station employment units of five to ten full-time employees are provided some relief from EEO program requirements, and station employment units of fewer than five full-time employees are not required to demonstrate compliance with the EEO program requirements. In addition,

<sup>49</sup> 13 C.F.R. § 121.201, NAICS codes 513210 and 513220.

<sup>50</sup> *Id.*

<sup>51</sup> We base these estimates on a compilation performed by the Equal Employment Opportunity staff, Policy Division, Media Bureau, FCC.

<sup>52</sup> At that time, we considered "MVPDs" to be all multichannel video programming distributors that were not cable operators.

<sup>53</sup> 5 U.S.C. § 603(c).

MVPD employment units employing six to ten full-time employees are provided some relief from the EEO program requirements, and MVPD employment units with fewer than six full-time employees are not required to demonstrate compliance with the EEO program requirements.

**F. Federal Rules that Overlap, Duplicate, or Conflict with the Proposed Rules:**

We note that certain commenters have indicated that federal, state and local EEO requirements serve much the same purpose as our EEO Rule. We have addressed these arguments, *supra*, in para. 130.<sup>54</sup>

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<sup>54</sup> See also *Report and Order*, 15 FCC Rcd 2329, 2360-61 (2000), *recon denied*, 15 FCC Rcd 22548 (2000)



**SEPARATE STATEMENT OF  
CHAIRMAN MICHAEL K. POWELL**

*Re: Review of the Commission's Broadcast and Cable Equal Employment  
Opportunity Rules and Policies (MM Docket No. 98-204).*

I am proud that the Commission has unanimously adopted new EEO rules. When we issued the notice of proposed rulemaking last December, we sought ways to revise the equal opportunity rules to be consistent with the holding of the D.C. Circuit in *Association*<sup>1</sup>. We do so here today by establishing effective and legally sustainable rules.

The public benefits of individuals in our society having equal employment opportunities, based on merit rather than discriminatory factors, *are* so numerous they are impossible to list. I believe few would disagree with this proposition. Thus, it is only right and proper for this agency to expect its licensees to afford equal opportunities for everyone. Indeed, I believe it is our obligation to attempt to widen the circle of those Americans that benefit from the fruits spawned by those licenses. If the public interest benefit means anything at all it cannot possibly tolerate the use of a government license to discriminate against the citizens from whom the license ultimately is derived. Thus, we will remain vigilant in our enforcement of these rules.

The rules we adopt today include a broad outreach program that is squarely race and gender neutral and, thus, not constitutionally suspect. The EEO rules focus on increasing the possibility that more minorities and women get the opportunity to compete fairly for employment. No one is entitled to rewards they did not earn. No one is entitled to jobs for which they are not qualified. But, *everyone* is entitled to an equal opportunity to vie for those rewards and compete for those jobs. The outreach program provides for the simple opportunity to compete for employment vacancies. All Americans, regardless of stripe, benefit when our workforce captures the rich talent of our great nation.

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<sup>1</sup> *MD/DC/DE Broadcasters Association v FCC*, 236 F.3d 13, reh'g den. 253 F. 3d 732 (D.C. Cir. 2001) pet for cert Filed, *MMTC v MD/DC/DE Broadcasters Association*. No. 01-639 (October 17, 2001).

**SEPARATE STATEMENT OF  
COMMISSIONER KATHLEEN Q. ABERNATHY**

*Re. Review of the Commission's Broadcast and Cable Equal Employment Opportunity  
Rules and Policies, MM Docket No. 98-204*

Today the Commission is adopting equal employment opportunity rules that are meaningful and effective and, just as important, will withstand judicial scrutiny. **As** I have stated previously, the Commission must respect the courts and craft an order consistent with the decisions set forth in *MD/DC/DE Broadcasters Association v. FCC* and *Lutheran Church-Missouri Synod v. FCC*. It would be irresponsible to place in jeopardy rules that can have a significant impact on the media opportunities available to all members of our communities by going down a road that is neither appropriate nor effective.

I appreciate all the valuable input that we have received from commenters in this proceeding and the rules we have adopted are responsive to their concerns. Broad outreach and anti-discrimination rules will enable all people from various backgrounds within each community to become aware of specific job openings and media opportunities in general. In addition, the longer-term recruitment initiatives, including scholarships and internship programs, will help a wide array of people develop the knowledge and skills to pursue media employment opportunities. Media companies will benefit from an expanded range of qualified applicants from which to choose and candidates will have a fair opportunity to compete for jobs. In the end, the public benefits from services created and delivered by a talented workforce. The rules we adopt today do not provide better opportunities for any particular group, but ensure equal opportunities for all.

**SEPARATE STATEMENT OF  
COMMISSIONER KEVIN J. MARTIN**

*Rc: Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Report and Order., MM Docket Nos. 98-204*

I am pleased to support this Order adopting Equal Employment Opportunity rules. Our goal has been to design an outreach program that is comprehensive, effective, and constitutional. I believe we have succeeded.

The program we have established ensures that broadcasters and multi-channel video programming distributors (MVPDs) will engage in expansive recruitment efforts, which will facilitate the ability of all members of society to learn about openings in the media sector. By choosing candidates from a larger, more diverse pool, broadcasters and MVPDs will be better able to find the most qualified candidates. A more talented workforce leads to improved programming, which ultimately benefits all consumers. The program we adopt today therefore should promote not just diversity, but also true competition. And –critically – it will do so in manner that will withstand court scrutiny

I note that this Order does not reinstate the requirement that licensees submit annual reports on the race and gender make-up of their workforce. **As** we stated in the NPRM, collection of this information could be useful for analysis of industry trends, but it is not a part of our EEO program requirement and is in fact required pursuant to a separate provisions of our rules.<sup>1</sup> We therefore will address the collection of this information in a future proceeding.

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<sup>1</sup> See *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Second Notice of Proposed Rulemaking, 16 FCC Rcd 22843,22858,150 (2001).

**SEPARATE STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

*In the Matter of Review of the Commission's Broadcast and Cable  
Equal Employment Opportunity Rules and Policies  
MM Docket No. 98-204*

When we approved the Second Notice of Proposed Rulemaking that formed the basis for the item we adopt today, I stated both my hope that the NPRM would result in strong EEO rules that I would be able to support, and my concern that the NPRM as written did not reflect the deep and passionate commitment to a diverse workplace that America must have if it is to fulfill its potential. I thank my colleagues for their willingness to work together since then. Each of us comes at this issue with somewhat different perspectives and premises. Each of us would likely have written the item differently if we were assigned authorship. Nevertheless, we engaged in dialogue so that we could reach some compromises that would not only create rules that would withstand court scrutiny but also -- and for me most importantly -- move us toward some credible equal opportunity initiatives. I commend Chairman Powell for his commitment to put in place rules for what I am convinced is one of the most important issues confronting the Commission

To me, EEO rules are indeed an essential part of the obligation to serve the public interest. This is not an area in which we can afford to be timid, because there is nothing less than civil rights at stake. Diversity of viewpoint, ownership, and employment in media have long been and continue to be fundamental public policy goals. In my view, how we craft these rules is also related -- closely, intimately connected -- to the public interest that both the FCC and broadcasters are charged to promote. This is not something we do at the fringes, or something divorced from our other ongoing work; it is, rather, at the heart of what we do, and how we do

here will affect how we do across the board.

We are taking some first positive steps on equal employment opportunity today. We require broadcasters and MVPDs to conduct broad outreach for all full-time job openings, to provide information on full-time job openings to community groups who request such information, and to participate in a number of longer-term recruitment initiatives. In addition, we have incorporated some of the input we received, both from commenters and from those who joined us for the *en banc* hearing back in June, to help make our original proposals stronger. For example, as suggested by the Minority Media & Telecommunications Council, stations and MVPDs that participate in job fairs under the menu of broad recruitment options in the rules must send personnel who have substantial responsibility for hiring decisions to those fairs. Further, as Charles Warfield of Inner City Broadcasting suggested at the *en banc*, we are encouraging the use of EEO training for industry management personnel by adding it to that menu of options. I am pleased that we will be looking more carefully at the application of the rules to part-time employees through a further notice. I am particularly pleased that we have emphasized in this order our commitment to examine and act upon licensees' compliance with our EEO rules at license renewal time. I, for one -- and I think I am not alone -- would be more than amenable to imposing strong and serious sanctions -- *very* strong and *very* serious, up to and including revocation of licenses -- for demonstrated lack of compliance.

As I stated when we released the Second NPRM, I understand that the decisions of the D.C. Circuit severely limited the scope of EEO rules the Commission could adopt. I was concerned that we not react timidly to a court decision that I personally thought was timid to

begin with. Then as now, I am saddened by any retreat in the area of equal employment opportunity and, indeed, in civil rights generally. Nevertheless that decision was out there, daunting and discouraging of the kind of proactivity that many of us would **like** to see.

Most of us understand that we are nowhere near the objective of equal opportunity in communications today – not that we've reached that happy summit in too many other areas of our national life, either. Just two years ago, a FCC-commissioned study by the Ivy Group documented what many of us already knew: that minorities and women have faced pervasive discrimination in the media industry since its beginnings. The report concluded that government actions or inaction on particular regulatory and market issues -- including "uneven enforcement" of EEO policy -- have exacerbated the barriers.

I've heard the bad news personally in my conversations with many minority and women's groups. African American broadcasters tell me that, even though some of them have done pretty well in this industry, they didn't think they could repeat that success the way things are going. Here, not so incidentally, is a hugely important area that **we** need to **look** at intensively as we study the effects of media concentration. The effects of consolidation are not just economic; they are man!-pronged and surely have critically important equal opportunity and diversity implications. We have a long way to go to open wide the doors of equal opportunity, and to keep them open, in our communications industries.

I also welcome the fact that today the Commission commits to helping spread the word about the importance we attach to these rules. I hope **we** will take full advantage of this

commitment, getting out around the country to emphasize the importance of equal opportunity and proactively assisting the industry toward full compliance. I hope we will follow through on this zealously, and I, for one, will be a willing and enthused participant.

Lastly, I cannot over-emphasize the important role that must still be fulfilled by all the individuals and organizations who assisted us in developing and crafting these rules. We owe you a deep debt of gratitude for all the hard work and dedication that went into this process. But as you know better than me, equal opportunity work is never done. So you need to help us – no, you need to lead us – into making this program live and breathe and work. I'll give you just one example. There was apprehension that, under the circumscriptions of the court, we could not require broadcasters to send job announcement notices to minority recruiters. That would be somehow too aggressive and intrusive. But I don't believe there is anything constraining any individual or organization from reaching out and urging any particular recruitment agency to request such notices from broadcasters. **And** we say in the item that said recruiter only has to ask once and it will be permanently on the list to receive such notices. It might not be the easiest or most ideal way to go, but it just may be workable and effective until we can do better. So I hope we will look creatively and imaginatively and actively at the rules being approved today. The point is that there is nothing that prevents a broadcaster, cable operator, or any other MVPD from taking action beyond what we require today.

While I've been in this town long enough to never be surprised, I would surely be immensely disappointed if anyone challenged this modest proposal. That energy could be better utilized in making the rules we approve today work. •  
Going forward, I would hope that, once

these rules are fully implemented, the Commission would consider pushing its equal opportunity program further.

I hope that today's proceeding will join all stakeholders in a spirit of working together to open the doors of equal opportunity. America is a land of diversity. We will succeed not **by** regretting that diversity, but **by** celebrating it. I hope all of us -- Commission, industry, trade associations, labor, and advocates all -- will celebrate our diversity **by** making these rules **work**. And when in the course of America's progress we are one day afforded the opportunity to be even more active, I hope we will seize that day, too.